

108 FERC ¶ 61,233
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Merrill Lynch Commodities, Inc.

Docket No. ER04-925-001

ORDER DISMISSING REQUEST FOR REHEARING
AND DENYING PROTEST

(Issued September 15, 2004)

1. On August 19, 2004, Allegheny Energy, Inc. (Allegheny Energy) filed a request for rehearing of the July 20, 2004 Letter Order granting Merrill Lynch Commodities, Inc. (MLCI) market-based rate authority (Letter Order).¹ In the same pleading, Allegheny Energy also protests the blanket authorization of issuances of securities and assumptions of liability by MLCI. This order dismisses the request for rehearing of the Letter Order and denies the protest of the blanket authorization of issuances of securities and assumptions of liability by MLCI.

I. Background

2. On June 14, 2004 MLCI filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of capacity, energy, and ancillary services at market-based rates. MLCI also requested waiver of various Commission regulations. MLCI asked that the Commission grant blanket authorization under 18 C.F.R Part 34 (2004) of all future issuances of securities and assumptions of liability by MLCI.

3. On June 16, 2004, the Commission issued notice of MLCI's request for market-based rate authority which was published in the *Federal Register*, 69 Fed. Reg. 35,340(2004), with comments, protests and motions to intervene due on or before July 6, 2004 (June 16 Notice). None was filed.

¹ Merrill Lynch Commodities, Inc., Docket No. ER04-925-000, issued July 20, 2004.

4. On July 20, 2004, pursuant to delegated authority, the Director, Division of Tariffs and Market Development – South, granted market-based rate authority and the request for blanket approval under Part 34. On July 26, 2004, the Commission issued a notice stating that “any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by MLCI should file a motion to intervene or protest” by August 19, 2004 (July 26 Notice). 69 Fed. Reg. 45,695 (2004).

5. On August 19, 2004, Allegheny Energy filed a motion to intervene, request for rehearing and protest. Allegheny Energy requested rehearing of the grant of market-based rate authority and protested MLCI’s request for blanket authorization of issuances of securities and assumptions of liability.

6. MLCI is owned by Merrill Lynch Capital Services, Inc. (Merrill Lynch Services), which is a subsidiary of Merrill Lynch & Co., Inc. (Merrill). Allegheny Energy states that it and Allegheny Energy Supply Company, LLC (collectively, the Allegheny Companies) entered into an asset purchase agreement with Merrill and affiliated parties in 2001, pursuant to which the Allegheny Companies purchased Merrill’s energy marketing and trading business. Allegheny Energy further states that in 2002, “certain Merrill entities” sued Allegheny Energy for breach of the purchase agreement.² The Allegheny Companies counterclaimed that Merrill (i) fraudulently induced the Allegheny Companies to enter into the agreement, (ii) breached certain representations and warranties, (iii) breached fiduciary duties, and (iv) engaged in negligent misrepresentation. According to Allegheny Energy, the case has been set for trial commencing on February 3, 2005.

7. In its pleading, Allegheny Energy alleges that when entering into the contract to buy the then existing marketing division of Merrill, the Allegheny Companies were unaware that Merrill had engaged in “back-to-back,” “wash,” “round trip” and other sham energy trades with Enron and perhaps others which resulted in an inflated price. Allegheny Energy states that the “wash” and “round trip” trades became the focus of both criminal and regulatory investigations. Allegheny Energy also states that in September 2003, Merrill settled claims brought by the Securities and Exchange Commission relating to these trades (described as year end 1999 transactions) and other dealings for \$80 million. Allegheny Energy alleges that Merrill acknowledged that one or more Merrill employees may have violated federal criminal law. Allegheny Energy states that “the Allegheny Companies do not wish to litigate the allegations of the counterclaims in this

² Allegheny Energy Request for Rehearing at 3, *citing* Merrill Lynch, *et al.* v. Allegheny Energy, Inc., No.02-CV-7689; U.S. District Court for the Southern District of New York.

forum. However, the Allegheny Companies believe that their counterclaims should be considered by the Commission because they are relevant to the Commission's grant of market-based rate authority sought by MLCI and the additional relief sought by MLCI in this proceeding."³

8. Allegheny Energy acknowledges that the market-based rate application filed by Merrill's affiliate MLCI met the four-part test that the Commission relies on in the grant of market-based rate authority but argues that, based on Merrill's conduct, it is not in the public interest to grant MLCI market-based rate authority.

9. On August 30, 2004, MLCI filed in opposition to Allegheny Energy's motion to intervene, request for rehearing, and protest. MLCI claims that there is no legal or factual basis for Allegheny Energy's claim. It states that its market-based rate application complies with the Commission's rules for such applications. MLCI argues that Allegheny Energy's claims have nothing to do with MLCI, whether it has market power, or its ability to sell wholesale power at market-based rates.

10. MLCI also contends that Allegheny Energy's motion to intervene is out of time and that it should have filed an intervention or protest to its original market-based rate application by July 6, 2004, the date on which interventions and protests for that application were due.

11. On September 3, 2004, Allegheny Energy filed an answer to MLCI's opposition.

II. Discussion

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Allegheny Energy's answer and will, therefore, reject it.

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), we will grant Allegheny Energy's motion to intervene filed in response to the July 26 Notice as that motion relates to the blanket authorization of issuances of securities and assumptions of liability. However, as noted above, Allegheny Energy did not seek to intervene in response to the June 16 Notice of MLCI's request for market-based rate authority, and thus Allegheny Energy's comments on that filing are rejected as out-of-time. Although we are granting Allegheny Energy's intervention in response to the July 26 Notice allowing interventions and protests on the blanket

³ Allegheny Energy Request for Rehearing at 3.

authorization of issuances of securities and assumptions of liability, Allegheny Energy must accept the record developed to date.⁴ This includes the Commission's July 20 Letter Order in this Proceeding.

14. In this regard, the Commission has previously ruled that "a person is not entitled to sit on his rights until the end of a proceeding and then have the entire matter reopened if the outcome is not to his liking."⁵ Allegheny Energy cannot use the Commission's allowing protests of blanket authorization of issuances of securities or assumptions of liability by MLCI as a vehicle to challenge the underlying approval of market-based rate authority. Allegheny Energy should have submitted its protest to the original filing before the issuance of the Letter Order granting MLCI market-based rate authority. We will not now allow Allegheny Energy to reopen the Commission's determination. Therefore, its request for rehearing is dismissed.

15. Even if we were to entertain Allegheny Energy's request for rehearing of our grant of market-based rate authorization, the Commission would deny its request. Allegheny Energy has acknowledged that it "does not dispute that MLCI has fulfilled the minimum filing requirements set forth in the Commission's regulations to engage in market-based rate transactions."⁶ Allegheny Energy's objections do not go to the basis of the Commission's grant of market-based rate authority, that MLCI does not have market power, and Allegheny Energy has failed to present compelling evidence in support of its allegations.⁷ Specifically, Allegheny Energy does not even attempt to address any of the

⁴ See *Mid-Continent Area Power Pool*, 101 FERC ¶ 61,006 at P 13 (2002); cf. 18 C.F.R. § 385.214(d)(3) (2004) (allowing limits on participation of late intervenor to avoid delay and prejudice).

⁵ *Rancho Riata Hydro Partners*, 55 FERC ¶ 61,389 at 62,187 (1991); *Central Illinois Public Service Commission*, 59 FERC ¶ 61,219 (1992).

⁶ Allegheny Energy Request for Rehearing at 6.

⁷ We note that in an order issued on November 17, 2003, the Commission adopted Market Behavior Rules designed to provide market participants adequate opportunity to detect, and the Commission to remedy, market abuses. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (*Market Behavior Rules Order*). To the extent that Allegheny Energy believes that MLCI has engaged in conduct that violates the Market Behavior Rules, Allegheny Energy can file a complaint pursuant to the procedures set forth in the *Market Behavior Rules Order*.

four factors that comprise our current test for market-based rates.⁸ Moreover, Allegheny Energy stated in its request that it does “not wish to litigate the allegations of the counterclaims in this forum.”⁹ We agree that this is not the proper forum to litigate these issues, and we reject Allegheny Energy’s request for rehearing.

16. Turning to the issuances of securities and assumptions of liabilities, the Commission traditionally grants blanket authorization for the issuance of securities and assumptions of liabilities to power sellers not subject to cost-based rate regulation.¹⁰ As the Commission has explained in previous cases involving market-based rate authority in which the applicants sought blanket authorization of issuances of securities or assumptions of liabilities, the purpose of section 204 of the Federal Power Act (FPA), which Part 34 implements, is to ensure the financial viability of public utilities obligated to serve consumers of electricity.¹¹ Accordingly, in cases such as the instant case, where the applicant does not intend to become a public service franchise providing electricity to customers dependent upon its service, the Commission’s practice is to grant the blanket authorization, subject to consideration of objections by an interested party.

17. Although Allegheny Energy protests the blanket authorization of issuances of securities or assumptions of liability, it has failed to show that a grant of blanket approval of issuances of securities or assumptions of liability would be inconsistent with the statutory standard.¹² As stated above, Allegheny Energy’s objections do not go to the analysis that underlies the Commission’s grant of blanket authorization of issuances of securities or assumptions of liability. In addition, Allegheny Energy has failed to present

⁸ The four-part test considers: (1) whether the applicant has generation market power; (2) whether the applicant has transmission market power; (3) whether the applicant can erect barriers to entry; and (4) whether there are concerns involving the applicant that relate to affiliate abuse and/or reciprocal dealing.

⁹ *Id.* at 3.

¹⁰ *See, e.g.,* Golden Spread Electric Cooperative, 97 FERC ¶ 61,025 at 61,069 (2001).

¹¹ *See* Citizens Energy Corp., 35 FERC ¶ 61,198 at 61,455 (1986); Howell Gas Management Co., 40 FERC ¶ 61,336 at 62,026 (1987).

¹² 16 U.S.C. § 824c(a) (2000).

compelling evidence in support of its allegations. Therefore, MLCI's request for blanket authorization for future issuances of securities and assumption of liability is granted and Allegheny Energy's protest is denied.

The Commission orders:

- (A) Allegheny Energy's motion to intervene is hereby granted.
- (B) Allegheny Energy's request for rehearing is hereby dismissed, as discussed in the body of this order.
- (C) Allegheny Energy's protest to the blanket authorization of issuances of securities or assumptions of liability is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.